ENVIRONMENTAL POLLUTION & INSURANCE

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Although there can be differing views as to what constitutes pollution in any one case, I suggest that it be defined as any deterioration of the environment resulting from contamination by material, whether it be solid, liquid or gaseous, or by energy, which emanates from some location, or from vehicles of any kind.

In English law, pollution may entitle those adversely affected by it to remedies against the creator of the pollution. Such remedies are confined to damages, or injunction, or both. The sanctions available under criminal law are outside the scope of my subject. The civil liabilities which may fall upon polluters may arise either at Common Law, or by Statute.

At Common Law the liabilities, and hence the remedies, are in tort. The prime tort is, of course, negligence, and I feel it is unnecessary for me to define the tort, but I should emphasise that an action under this head requires proof of negligence unless one can bring a case in circumstances where res ipsa loquitur. For example, if I am the proprietor of fishing rights in a river and the fish are killed due to contamination of the water by injurious chemicals, to succeed in a claim based on negligence I must be in a position to prove that the contaminati entered the water due to negligence on the part of some defendant. This might not be easy, for how am I to challenge the defendant, who claims, with supporting technical evidence, that the emission complained of occurred without negligence? The more highly technical the processes involved the more difficult is proof of negligence by someone not in the know. In such a case one of the other two tortious remedies may perhaps be employed. The first of these is nuisance. The limitations of this tort must also be borne in mind. Based on the latin tag "Sic utere tuo ut alienum non laedas" - so use one's own that you do not hurt your neighbour - the obligation is in respect of the occupier of your neighbour's land, or of passers-by in the street. Thus if a tile falls from my roof on to my neighbour's car, I am liable to him in nuisance, but not if the tile strikes the car of a visitor to my neighbour. On the other hand if the tile falls into the street, I am liable in nuisance to anyone who is struck thereby. In addition to falling tiles; vibration, noise, smells and spreading roots have all been held to be actionable nuisances. Seepage of chemicals from a manufacturer's premises on to the land of his neighbour would clearly fall within this definition.

The third category is that covered by the general sweeping up provisions of Rylands v- Fletcher. However familiar this case must be I think it might be helpful to quote the words of Blackburn J. in the Court of Exchequer Chamber in 1866. He said :-

"The true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape".

I quote these words because, when the case went to the House of Lords, where it was affirmed, there was reference to non-natural user of land. I beg leave to doubt if "non-natural user" was part of the ratio decidendi in the Lords - it was rather in the nature of a gloss, but much attention has been devoted to these words, to such an extent that it is now commonly suggested that the use of land for industrial purposes is not "non-natural user" in the second half of the twentieth century and, accordingly Rylands v. Fletcher no longer wields the power which once it had. I beg leave to doubt this. I do not think it appropriate to pursue this argument further here, but I make the point because clearly under the rule expressed by Blackburn J. there will be liability for pollution in cases where neither negligence nor nuisance can be proved. For example, a farmer allowed a contractor to excavate for sand on his land. This was a licence, not amounting to a lease and the farmer remained in occupation. In the course of the operations a diesel bowser was brought on to the land and, when the operations were completed, to facilitate removal, a sub-contractor emptied the bowser. The oil leaked from the farmer's land into a stream, rendering it unusable for agricultural purposes by other farmers downstream. Due to the physical remoteness of such farmers it was questionable whether a claim in nuisance lay; while there was negligence on the part of the sub-contractor, the plaintiffs experienced difficulty in tracing him, so they proceeded against the first farmer under Rylands v. Fletcher. The oil had been brought on to his land for his purpose - albeit indirectly, to enable him to exploit the sand - it was likely to cause damage if it escaped, and it escaped. The plaintiffs thus set up a defendant to sue and left it to him to pursue any other party he wished to involve.

Turning next to Statute Law, there are many acts which have a bearing on the subject, ranging from the Waterworks Clauses Act 1847 to the Deposit of Poisonous Wastes Act 1972.

Some are concerned with pollution only by chance, whereas others are directed to the protection of the environment. Some are merely criminal statutes but others provide a civil remedy. In particular the Deposit of Poisonous Wastes Act specifically provides a civil remedy.

Any person, therefore, who suffers damage as a result of pollution, has a number of possible remedies which he can examine. As always, however, in English Law he must be able to bring himself within the provisions of a tort or a statute: there is no general right of action for pollution per se. Nor is there an action either by, or against the world at large. Legal rights are particular and limited.

In the light of this legal position, we may consider the position of insurance. The essence of insurance is that it is concerned with fortuity: where an event is not accidental it is not intended that there should be any cover. Pollution may be the result of an accident, but not necessarily so. Emissions of noise are usually deliberate; displacements of dust, discharges of effluents, deposits of wastes are normally not accidental - not in the sense that the damage caused by them is intentional, merely that the cause of the pollution is a normal trade process. Insurers are not, as a rule, prepared to cover this sort of pollution at all.

Even in confining their cover to the consequences of accidents, insurers have developed a number of differing approaches. There are three principal alternatives; these provide an indemnity to the insured in respect of his liability to pay damages :-

(i) for accidental personal injury or disease or accidental damage to property,

(ii) for personal injury or disease, or damage to property caused by accident,

(iii) for personal injury or disease or damage to property - tout court.

In practice the results of these clauses can differ. The second one - injury or disease caused by accident probably most closely represents our intentions for there is authority that "accidental injury" is accidental vis-a-vis the person suffering it and so the first alternative can cover the results of a deliberate act by the insured. The third alternative is always supported by an exclusion of any deliberate act, but in such a case it is incumbent upon the insurer to prove the exclusion - not always an easy task.

Take a common example of a continuing trade process which allows polluting wastes to leak away and to cause disease or damage. A policy which covers accidental injury or damage may have to deal with such a claim whereas a policy confined to injury or damage caused by accident might not.

I do not wish to go into the niceties of policy drafting, but I mention this to indicate that not only must insurers satisfy themselves as to the cover which they are prepared to give but also must ensure that this is the cover which they are giving. Ina field such as this it is by no means easy to ensure that!

It must not be assumed, however, that insurers are primarily concerned with protecting themselves against unforeseen risks - on the contrary they are in business to protect their insured against the accidental occurrence, but do not wish to replace an insured's own safety precaution system. On the other hand, if there is a particular risk, insurers are usually prepared to underwrite it as a special case. For example, a firm of contractors required cover for injury or damage resulting from their activities in depositing waste at specified tips, now commonly described as "land in-fill sites". This cover was given, being specifically underwritten. On two separate occasions poisonous material percolated down through the floor of the tips involved and found its way into underground streams. The streams in turn eventually ran out into open country and were used by farmers for agricultural purposes - for irrigation of land and for watering cattle. In both cases, as a result of the poison, cattle were injured and crops were ruined. Proof of the source of the poison having been forthcoming, claims were made, not only for the loss of cattle and crops but also for the cost of abating the trouble for the future. This latter cost boded likely to be extremely expensive but, as it so happened, was not the subject of insurance. It must not be assumed, however, that in no circumstances could it be an insured risk - it might well be so in another case.

On a third occasion, waste was again carried by underground drainage but instead of emerging as a stream with access to crops and beasts, this time it percolated into the subsoil of an adjoining occupier's land. This subsoil was gravel which the owner proposed to exploit. He alleged that the impregnation of the gravel by toxic chemicals made it unsuitable for use as aggregate in concrete. While the agricultural use of the land was unaffected, its industrial development was precluded and a claim for loss of this right was made.

Another specifically underwritten case concerned the use of bitumastic paint for coating the inside of water mains. A bituminous emulsion was pumped into the main. An electric current was then discharged through the emulsion which caused the bitumen to separate out and precipitate on the walls of the pipe. The pipe was then flushed out and all was done.

On one occasion the bitumen emulsion was defective and the precipitated bitumen did not adhere to the pipe walls. Over a period of years bits of it peeled off and washed along the mains. Although quite insoluble in water and perfectly harmless in cold water it nevertheless worried housewives who had black bits coming out of the tap and it was harmful to a laundry where it softened in the hot water and detergent and ruined loads of washing over a period of years. Nothing could be done except pay the claims as they arose.

In yet another case a claim arose from a local authority's vehicle park. It was the occupier's practice to clean and maintain its vehicles on this site and there was also a store of salt needed for winter use on the roads. The depot is situated on the banks of a stream and over a period of time oil, salt, and grit all tended to get washed into the stream. This contamination prevented a farmer downstream from watering his cattle from the stream and, in addition, sludge built up on the bed of the water course requiring it to be cleaned out. Moreover, the stream falls into a larger brook and a frontager to this used to draw water for his tomatoes. Being unable to use this water he contended that he had suffered a reduction in crops.

These cases were all insured - in part if not in whole - and illustrate how pollution claims can be dealt with through insurance, but I emphasise that they all depend on that element of fortuity which is cardinal to the whole system of insurance. It may be asked why insurers limit themselves to accidental damage? Confining a reply to pollution, I suggest that there are two principal reasons :-

(i) To relieve an insured of an obligation to prevent unnecessary pollution is socially undesirable.

(ii) Economically it makes no sense: the cost of paying compensation will be the same, it is in large measure predictable and hence calculable: insuring it will not reduce the cost, merely add the insurers' administrative and profit costs to it.

On the other hand, insurance in respect of accidents is desirable for insurers are interested in reducing the frequency or likelihood of accidents and will take steps to that end, which is socially desirable, and it makes economic sense in that for any policyholder the incidence is not precisely calculable - or even roughly calculable and the function of insurance is to give cover against the unforeseeable.

What then of the future? I feel that insurers will continue to refuse to cover trade risks - the necessary concomitant of carrying on the business in the way in which it is conducted, but on the other hand, as people become more and more concerned with the problems of pollution they will tend to look for remedies: in consequence more claims will be made in circumstances unforeseen by insurers. It is, of course, a truism that there are always new liability claims arising - I see no reason to doubt that this will continue. Insurers will thus have to keep a continual watch on their policy wordings.

For example motor policies do not contain any exclusion of pollution claims and it may be that eventually this will come - not to exclude the risk in toto but to allow for it to be underwritten. This, of course, raises ancillary problems for personal injuries arising from the use of a motor vehicle on the road must be insured and accordingly insurers' ability to manoeuvre is limited. Some day property claims may also be compulsorily insured.

I suggest also that professional negligence insurers - that small, select and steadily shrinking band - will have to be on the alert for this risk. If architects or engineers design works which result in avoidable pollution they may be held liable to their clients, and it could be that this would apply not only if the client is held liable in damages, but also if fined.

When this aspect is raised it becomes apparent that in many cases - not only professional negligence risks - the limits of indemnity presently quoted are inadequate. If limits are to go up, reinsurance cessions must also go up, and reinsurers may be unwilling to accept lines on pollution risks at the rates commonly quoted for the higher limits of excess of loss treaties at present. If not, the basis of rating for these large indemnities may have to be revised, producing very considerably higher premiums, with accompanying political problems.

One thing I do not expect to see, however, is a vast widening of the categories of persons able to claim, or liable to be sued. As I said earlier, English law requires a claim to fit into a category: even if there seems a wrong, without someone to sue there can be no action. Hence in part the Criminal Injuries Compensation Board. For example, a house on a busy road may be damaged by vibration from passing traffic - but can the occupier find anyone to sue? No one vehicle may create enough vibrations to do any damage - at least none that would not be excluded by the de minimis rule - yet damage is suffered. Those living near airports suffer from noise, yet a claim against the airport in nuisance would probably fail on the defence of statutory powers - what is authorised by statute cannot be a civil wrong in the absence of negligence - and a claim against the airline, if not defeated on the same grounds requires proof of identity and a way round the de minimis rule.

A general deterioration of the environment caused by the way we live is something which cannot be handled by the present civil law and in consequence by the present system of legal liability insurance.

I have heard two suggestions made to help the sufferers in such cases, one being legal, one being insurance, and both accordingly appropriate for this Association to consider.

The first is a licence to pollute. The idea is that as a certain amount of pollution is unavoidable the creators of it should be taxed on the pollution they create; in exchange for the tax, they receive a licence to continue and the money received is used as compensation for the sufferers. Anyone who pollutes without a licence is liable to have his operations stopped and be heavily fined. Thus a factory which causes smells, or smuts, or noise to be emitted must have a licence, the fee being related in some way to the extent of the pollution. The licence fee could be used in various ways. If it be noise, a baffle wall could be built to isolate the neighbours or double glazing be installed, if smuts the adjoining occupiers could receive a cash payment to enable them to replace curtains, furnishings, linen etc. more frequently than they normally would, to cover laundry and cleaning bills, or redecoration costs.

There would be an inbuilt incentive for the factory owner to reduce the pollution to bring down the licence fee, and similarly, even if the pollution did not increase the fee could go up to encourage an improvement. Clearly this envisages very large fees - no question of £25 or £100 but anything from, say, £50,000 upwards. If the company cannot pay it must cease production, which ends the pollution.

Clearly there are great difficulties - the question of reasonableness, of retaining men in employment, in assessing the nature and extent of the pollution. And what of private houses? - the damage caused by coal fires in the way of smoke is enormous.

Road traffic is a different problem, but could be tackled in the same way. The present road tax could include a supplement for a pollution fund which would be used for repairing and protecting buildings damaged by traffic. However, we all know what happens to special funds once swallowed by the treasury!

There is, of course, an overlap with existing legal liabilities and also with, what might be a natural extension of such liabilities in connection with dangerous goods. There are existing rules made by the D.T.I. in connection with the conveyance of dangerous goods by sea. It is not unreasonable to expect that such rules may in the future be extended to apply simply to the conveyance of dangerous goods. Now there is obviously an overlap here between straightforward accident liability - a drain which explodes and kills someone - and pollution liability - a drain which leaks and contaminates a ditch bordering a field and draining into a stream. This is not of great moment for we are looking at something which can be <u>in addition to</u> existing liabilities and not in place of. Whatever scheme be favoured I feel it must be emphasised that it should not be intended to remove existing liabilities but to ensure that, whatever remedies exist at the moment, these should remain.

It can be argued, of course, and no doubt would be argued, that if a person pays a licence fee allowing him to pollute, he should not be open to be sued for damages in addition. Why not? The licence is to provide a form of compensation to those who have no remedy under the existing law. If someone creates pollution in such a form as to give rise to an action for damages, he should not be able to say that he has a licence to do that - which could well substitute an inferior liability for an existing one. I also have reservations over any suggestion that the existence of a licence should be a defence to a plea for an injunction. It could well replace a common law remedy with an inferior statutory one.

In this connection, I was interested to see, in the December issue of Vision, a plan on somewhat similar lines. In talking about pollution, generally, the writer said :-

"My hope is that we may move towards a materials use tax. This would be a tax on most things on their first withdrawal from the environment at a level equal to their cost to the community if eventually disposed of in the most polluting possible legal way (e.g. a plastic container would pay more tax than a paper bag, because it would stay pollutant longer, and coal or petrol would pay more than natural gas). Then anybody would be able to get payment from the proceeds of the tax if he disposed of any effluent, his own or somebody else's, in a less pollutant way.

This would not just (a) drive everybody to use less pollutant materials (paying smaller tax) or recycled materials (paying no tax second time round because they would not then be being withdrawn from the environment). Much more important, it would (b) make it profitable to say 'here's a beautifully dirty pond, let us devote our corporate resources to making it cleaner because we will be sure to find a lot of pollutant that somebody has spilled into it over the ages and we will be paid for getting rid of it unpollutantly'. "

I notice also in the New Law Journal for January 18th there is reference to a Solicitors' Ecology Group - a body set up to consider the role of Solicitors in what is described as a crisis for humanity. It is mentioned that the threat to the environment is due to "the economic and technological drive to maximise productivity and consumption and minimise costs in the production and use of new materials, goods and services by industry". The article goes on to discuss matters which are rather wider than pollution - it is not every attack on the environment which is a pollutant, although I have seen attempts made to extend the idea to embrace any deterioration in our surroundings. I doubt if the existence of a quarry (as distinct from the noise, dust, mud and so on associated with its use) is pollution as generally understood.

It was also interesting to see the opinion that "probably ... most polluting acts are in one way or another illegal, that is to say criminal, tortious or in breach of statutory duty as the law now stands."

This Group is now confronting the fundamental question of the role of law in society. It suggests that law exists to protect the environment, not the amenities of the middle class.

I consider that the suggestion I have made concerning a licence to pollute, is one which may appeal to this Group, for they have referred to "the economic drive to maximise production".

A tax - or licence fee, if you so desire - may well be a material factor in causing any industrialist to consider seriously whether his economic interests are best served by a process which can only be pursued subject to a substantial economic disability, or whether some alternative method of conducting his business might be preferable.

The second approach is by way of insurance - pollution insurance offered to the owner (or occupier) of property. Not a third party cover but an own damage insurance in the form of another special peril. It would need to be applied universally to avoid selection and it could not cope with everything, but it could deal with physical damage caused by pollution.

It would not cover personal injuries, but these can be dealt with at present under P.A. insurance. It could not easily deal with noise, but some cover would be given if it were felt to be needed.

I do not think it is necessary to burden you with many examples, as they spring readily to mind - damage to buildings by vibration, to clothing and furnishings by dirt and fumes. I have reservations about aesthetics - for example, an impairment of a view by cooling towers, although, if someone much more clever than I can devise a basis for compensation and a method of rating, I see no reason to exclude even this.

This suggestion might appear to be a little far-fetched, but I should like to leave you with one final thought. Pollution is a current problem and is one which will not readily go away. It calls for some remedy, and part of that remedy can be provided by insurance. If insurers do not take steps to provide the remedy there is little doubt but that it will be undertaken by the State, and there is another category of business lost to the insurance market.

GERMAN SOCIAL INSURANCE LAW IN EUROPEAN PERSPECTIVE

by Hans Möller, Hamburg

I INTRODUCTION

This paper is entitled "German Social Insurance Law" because in Germany most of the major benefits commonly included in the more general concept of "Social Security" have traditionally been provided through the insurance mechanism. But, as you well know, this is not the only possible way of providing benefits. All kinds of different systems have developed in the various member countries of the European Community, and therefore the subject has to be put into a European perspective. Before discussing some current problems of the German system, I will briefly explore some of the international aspects that are likely to affect you here in the United Kingdom. In this respect we will have to look not only at the European Community but also at other international organisations.